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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 431.

CHARLES WINSTON, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

GEORGE KEARNEY,
Attorney for Petitioner.

CHARLES H. TURNER,
Of Counsel.

1 In the Supreme Court of the United States.

In the matter of the application of Charles Winston for a writ of certiorari in the case of Chas. Winston vs. The United States. In the court of appeals of the District of Columbia.

Petition for writ.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Chas. Winston, respectfully shows and *and* gives your honorable court to be informed, as follows:

1st. That he is a citizen of the United States and a resident of the District of Columbia.

2nd. That your petitioner was indicted in the supreme court of the District of Columbia at the January term thereof, A. D. 1898, for the murder of his wife, Emma Winston. (See record hereto annexed.) To this indictment, on Feb. 12, 1898, he pleaded "not guilty." Thereupon was issue joined, and he was put upon his trial in the court aforesaid on March 8, 1898.

2 3. That upon the said date there was in full force and effect in the said District of Columbia a certain statute, to wit, the statute of Jan. 15, 1897, entitled "An act to reduce the cases in which the death penalty may be inflicted," a portion of which act being in the words following: "That in all cases where the accused is found guilty of the crime of murder or of rape under sections 5339 and 5345, Rev. Statutes, the jury may qualify their verdict by adding thereto, 'without capital punishment,' and whenever the jury shall return a verdict as aforesaid the person convicted shall be sentenced to imprisonment for life." (29 Stat. at Large, 487, sec. 1.)

4. That the presiding justice (the Hon. Andrew C. Bradley) at the conclusion of the testimony, on his own motion, charged the jury as follows:

3 In the evidence in this case the circumstances are of such character that it will not be necessary for me to instruct you at any length. Therefore I shall detain you but a very few minutes, and when I shall have concluded the entire responsibility of this case will rest with you.

The indictment charges the defendant with the murder of his wife, by shooting her with a pistol ball fired from a pistol in his hand, on the thirteenth day of December, 1897. The indictment charges that this act was committed maliciously, willfully, and of his mal*ice* aforethought, as these indictments ordinarily express it. So that the question for you to determine will be whether this woman, who was killed, as the evidence indicate' beyond any doubt or question, by a pistol ball, was killed by her husband, the defendant, who is now on trial, or whether she committed suicide, as it is called, or perpetrated self-murder.

By the testimony it appears that the dead woman, the wife of this man, was a woman of small statu*re* and that she weighed about 150 pounds. There is no testimony in behalf of the defendant nor is there any in behalf of the prosecution which tends to show that immediately

before the pistol was fired an altercation or struggle occur'ed between the defendant and his wife. We are entirely unenlightened except by the testimony of the defendant as to the ciacumstances that attended this shooting.

It is not claimed *plain* that there was any struggle or that there was any altercation between the defendant and his wife. The defendant does not claim that his wife assaulted him or that she rendered him seriously angry, or that he fired this shot in the heat of passion. He says that every thing was peaseful/ so far as their relations were
4 concerned, except that his wife was jealous of him, that there was no antecedent struggle, and that he did not fire the fatal shot at his wife, but that it must have been fired by her own hand. So that there is but one question here. It being undisputed that this woman was killed, that she was killed in that room, and that she was killed by a pistol ball, that question is, who did it? Was it the act of the defendant, or was it the act of the deceased? If yo' believe from the evidence that the defendant did not not fire this fatal shot, or if you believe from the evidence that the deceased woman took her own life, your verdict necessarily must be for the defendant—the verdict of not guilty. But if you believe, beyond a reasonable doubt, that this woman met her death from a pistol ball fired from a pistol held in the hand of the defendant, and that her death was caused by him, I think your verdict shou'd be guilty as indicted, for there would be a presumption of mal*a*ce arising from the fact that her death was accomp*r*ished by the firing of a pistol ball by the defendant from a pistol held in his hand; and as there is no evidence that has been adduced which tends to show any pal'iating or mitigating circumstances there could be but one reasonable inference from the fact of the shooting, and that would be that it was committed with mal*a*ce aforethought.

Mal*a*ce may be indicated in various ways. It should be indicated b*u*y the testimony, or by the evidence in some way, in order to justify the verdict of guilty of murder. But the use of a pistol in such a was as that its use may and does cause death would be evidence of mal*a*ce. Evidence of prior threats to take life would be evidence of mal*a*ce. Evidence tending to show not one wound, but several wounds, tending to show a deliberate purpose to take life or accomplish death wou'd be evidence of mal ce. So that if you believe from the evidenc', beyond a reasonable doubt, that this defendant killed his wife with a pistol ball, that he fired into her head three shots from that pistol, you would
5 be justified in reaching the conclusion, in the absence of any circumstances showing mitigation of the crime or anything pal'iating it, that the defendant is guilty as indicted, and you would be required by your duty to return a verdict of guilty as indicted. The district attorney has adverted to what is called reasonable doubt, and he has explained it sufficiently, I think. Som' of y'u who have performed jury duty before know that it does not mean any kind of doubt that a jo*u*or may entertain in his own mind, but it means a doubt which ar*i*ses out of all the circumstances in the evidence, and which the jury, after having considered and weighed all the circumstances, reasonably entertain. When a jury shall have ar'ived at a conclusion amounting to a conviction, that is when they shall have had their minds convinced by the evidence that

a certain conclusion is right, then they are satisfied beyond a reasonable doubt. If you should be satisfied beyond a reasonable doubt that the defendant killed his wife with malice aforethought, you should return a verdict of guilty as indicated.

Now you have been told, and it is the law since the act of Congress passed in January, 1897, that the jury is authorized when they shall have arrived at the conclusion that a defendant on trial is guilty of murder, to qualify their verdict by adding thereto the words "Without capital punishment."

Counsel has endeavored to impress upon the jury the fact not only that this right exists, but that it is the duty of the jury to so qualify their verdict in any given case. Because they have the opportunity of extending mercy, it is argued that, therefore, the duty follows the right. Because it is your privilege or opportunity to qualify the verdict by adding without capital punishment, it is your duty so to do. But the law was not so intended, gentlemen of the jury. It was intended to serve some useful purpose. There are many shades of circumstances that go to make up the crime of murder in different cases. In some instances the circumstances might be such as to bring the crime within the definition
6 of murder, and yet those circumstances might not indicate that degree of wanton'ess, wilfulness, and heinousness that other circumstances would indicate, but yet would bring the crime no less within the definition of murder. I think it was intended by Congress that in cases where the crime is clearly murder within the definition of the law of murder and yet there are circumstances which tend to mitigate the offence, pal'iating circumstances that tend to show that the crime is not so heinous in its character, the jury may add the words "without capital punishment," and the law then makes the penalty imprisonment for life.

That qualification can not be added unles' it be the unanimous conclusion of the twelve men constituting the jury. I think that it should not be added unless it be in cases that commend themselves to the good judgment of the jury, cases that have pal'iating circumstances which would seem to justify and require it.

The penalty for the crime of murder has not been abrogated by Congress. The lawmaking power has seen fit to al'ow that penalty to remain; and it is only in those cases where the circumstances indicate to the jury the propriety and the necessity, perhaps, or the duty of making such qualifications that the jury should add the qualifying words, "without capital punishment." In all other cases the law speaks. The jury need not qualify the law. It is not their duty to so qualify it. It is their right and privilege in a proper case to so qualify it.

But you are not responsible for the law; nor am I. Neither are you responsible for the facts that you are brought here to try this case. If the defendant did not commit this crime he should be returned by your verdict not guilty. If he did commit the crime, then he is responsible for these conditions, not you. Your simple duty is to declare whether he is guilty or not guilty. If guilty, then your verdict should be either guilty as indicted or guilty with the qualification.

7 To which charge your petitioner, by his counsel, then and there excepted, especially to that part of said charge which related to the act of Cong. approved Jan. 15, 1897, above cited, and the trial justice

noted the said exception upon his minutes before the jury retired to consider of its verdict.

5. That thereupon the jury retired, and later returned and declared their verdict to be "Guilty as indicted," and that thereupon your petitioner was remanded to jail, and on the 18th day of March, 1898, a motion for a new trial was overruled and your petitioner was sentenced to be hanged on the 25th day of May, 1898. And that thereupon your petitioner prosecuted an appeal in court of appeals of the District of Columbia.

6. That the appeal of your petitioner from the judgment above cited was heard in the court of appeals of the District of Columbia at the May term thereof, and said judgment was affirmed in an opinion rendered by Mr. Ch. Justice Alvey, as appears in the record accompanying this
8 petition, from which opinion Mr. Justice Shepherd dissented, as also appears in the record above cited.

7. That your petitioner was respited by the President from the sentence imposed from May 25, 1898, until June 25, 1898, and from June 25, 1898, until Jan., 1899.

9 *Points.*

The error complained of by petitioner is in the construction of the court placed upon the act of Congress of Jan. 15, 1897, entitled "An act to reduce the cases in which the death penalty may be inflicted." This act provides in the most explicit terms "that in all cases where the accused is found guilty of murder * * * the jury may qualify their verdict by adding thereto 'without capital punishment.'" There is here no ambiguity of language and no excuse to go beyond the plain words of the statute to gather the meaning of the legislators. There being no ambiguity the accused was entitled to the full strength of the letter of the law. On this point we beg to quote from Sutherland on Stat. Const., sec. 247: "If the words of the statute are precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do in such cases best declare the intention of the legislature." And again, we find in Potter's Dwarris on Statutes the following, p. 245, note 35: "A further rule is that an offender who is protected by its letter can not be deprived of its benefit on the ground that his case is not within its spirit." Citing
10 United States v. Ragsdale, 1 Hemp., 497. The words of the statute of Jan. 15, 1897, are "precise and unambiguous;" it applies to all cases of murder. It was not competent for the trial court to limit its application to a certain class of cases, to wit, cases with mitigating circumstances. This action of the court was plainly contrary to the spirit of our criminal jurisprudence, and in violation of the well-settled rule of construction of penal statutes. Especial attention is invited to Endlich Interpretation of Statutes, sections 4 and 7.

"The legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction." (Sec. 4.) And again, "When the words admit of but one meaning a court is not at liberty to speculate on the intention of the legislature or to construe and act according to its own notions of what ought to have been

enacted. * * * The question for him is not what the legislature meant, but what the language means." (Sec. 7.)

In any event the accused was entitled to the most favorable construction of the words of the statute. See Sutherland Stat. Const., sec. 347, 349; Endlich Interpretation Stat., sec. 329; Bishop Stat. Crimes, sections 196 and 227.

11 Hence it is manifest that the trial court erred in attempting to write into the law, i. e., the act of Jan. 15, 1897, a limitation which the plain words of the act in their ordinary meaning did not contain.

2. Assuming, however, that there was any occasion for the court to go beyond the letter of the statute of Jan. 15, 1897, to ascertain its meaning, we most respectfully submit that the court misconceived the scope and spirit of the said act.

This act was passed by the 54th Congress, and to elucidate the meaning placed upon it by that body we quote the following:

12 Mr. CURTIS. "In the Fifty-third Congress a bill was introduced defining murder in the first and second degrees. The Committee on the Judiciary unanimously reported it, and it passed the House of Representatives. While pending in the Senate, the Attorney-General of the United States, Mr. Olney, was of the opinion that murder should not be defined as of the first and second degrees, and members of the Committee on the Judiciary of the Senate were also of the opinion that as the practice of the Federal courts is that of the common law, it was not advisable to introduce the question of definition into the statutes, and that it was preferable to repeal such sections prescribing capital punishment for offenses which the committee thought it desirable to have abolished." * * * "In respect to the crimes of murder and rape it preserves the death penalty, but it permits, as is provided in the State of Louisiana in express terms, and in many other States in principle, that the jury may, in bringing in their verdict, decide whether capital punishment shall be inflicted or not, by allowing the jury to add the words 'without capital punishment' to their verdict. If that clause is added, the court will sentence the accused to imprisonment for life, and if there is no recommendation, then the death penalty will be inflicted, as now provided for those crimes."

Mr. SAYERS. "I should like to know from the gentleman (Mr. Curtis) whether, where robbery is attempted and death follows, this bill modifies the punishment inflicted?"

Mr. CURTIS: "The bill allows the reduction of the penalty in every case. The jury decide in each case." * * *

"I am sorry, I frankly say, that this is not a bill totally abolishing capital punishment." (Congressional Record, 54th Congress, 1st session, vol. 28, pt. 3, pp. 2649–2650.)

13 3. It thus appears that this statute was adopted as a law of the United States from the State of Louisiana (see Wolff's Louisiana Rev. Laws, 1897, sec. 1000), and hence the trial court should have given it the same construction that it receives in that State. (Potter's Dwarris Statutes, p. 42, note 3; Cathcart v. Robinson, 5 Peters, 263; Allen v. St. Louis Bank, 120 U. S., 20, 34.)

The practice in Louisiana seems to be to leave absolutely to the jury the discretion of affixing or withholding the qualifying words in their

verdict. See State v. Melvin, 11 La. Annual, 535, 537, in which the following words appear: "The qualification of a verdict should be left where the law has left it, to the sound discretion of the jury upon the facts of the case, guided by a sense of their solemn responsibility, which is to do their whole duty to the State as well as to the accused."

14 4. Statutes similar to the act of Jan. 15, 1897, have been enacted in several of the States, and in those States the practice seems to be to leave wholly to the discretion of the jury the fixing of the punishment. The trial justices in these several States appear to content themselves with a mere naked exposition of the law.

Spain vs. State, 59 Mississippi, 19, 24 (1881):

"The judgment must be reversed because of the second instruction given at the instance of the State. It limits and qualifies the right of the jury to fix the punishment at imprisonment for life, whereas the law confers on the jury this right without qualification or restriction. The right of the jury to fix the punishment, as indicated, is without any condition. The most atrocious crime committed under the most aggravating circumstances may be punished by imprisonment for life instead of by death, if the jury so determines by its verdict. The law demands a jury willing to be the instrument of visiting the penalty of death and confers on such a jury the unconditional right to fix the punishment at imprisonment for life. It was erroneous to instruct the jury that its right was dependent on any state of the evidence or on any view it might take of it." (See also Walton v. State, 57 Miss., 533.)

Hill vs. State, 72 Ga., 131:

"The code leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; they are not limited or circumscribed in any respect whatever; nor does the law prescribe any rule by which the jury may or ought to exercise this discretion. Therefore, a charge that the jury, in considering the question of recommendation of mercy, should not be governed by their sympathies, but by their judgments, approved by the evidence in the case and the law applicable to it, was error."

Marshall vs. State, 74 Ga., 26, 31:

"They were instructed that if they found the defendant guilty of murder, they had the right to recommend that he be punished by confinement in the penitentiary for life, and if they made that recommendation, that had to be the penalty. In other words, they fixed the penalty, or they had the right to refuse the recommendation, as they saw proper. If they failed to recommend, the prisoner might be hung, or if they recommended that he be imprisoned in the penitentiary for life, then that was the penalty fixed by law; that was a matter entirely with them, upon which the court gave them no instruction, as he had no right to do so; that it was a matter of which they had absolute control."

15 Inman vs. State, 72 Ga., 269, 280:

"In regard to the right of the jury to recommend imprisonment for life, the better practice is for the court to call the attention of the jury to the law and merely state to them that, if they think proper, they may, in addition to the verdict of guilty, recommend that defendant be imprisoned in the penitentiary for life."

(See Doran v. State, 7 Texas Ct. App., 385; Myers v. State, 8 Texas Ct. App., 321.)

In California it seems a contrary view was taken for a time, but the older cases were overruled in People v. Leary, 105 Cal., 486, 495, in which the following appears:

"The legislature having confided to the discretion of the jury the fixing of the penalty of death or confinement in the State prison for life upon a verdict of guilty of murder in the first degree, the discretion of the jury in that matter is absolute."

Indeed, the earlier case of People v. Bawden sharply criticises the action of a trial judge in instructing the jury upon this point. (See People v. Bawden, 90 Cal., 195, 198.)

The only text writer that we find who has touched the subject at all is McClain, who, in sec. 363 of his work on criminal law, says:

"By some statutes a discretion is left to the jury in determining the punishment, * * * and the court should not in any way interfere by instruction with the discretion of the jury."

16 5. Several murder cases have been tried in different United States courts under the act of Jan. 15, 1897, and while these cases are not reported, we append extracts from the charges of the trial justices taken from stenographic notes.

Mr. Justice Bryant, in the eastern district of Texas, at the April term, 1898, in the case of George De Laughter, charged the jury as follows: "In that event you will find the defendant guilty, as charged in this indictment, and if you see proper so to do, add to your verdict, 'without capital punishment.'" In the case of J. W. Lewis, tried at the same term of the court, the charge contained the following: "A killing, upon either express or implied malice, in this court is murder, and, upon conviction, punishable by death, unless the jury in their discretion see proper to add to their verdict 'without capital punishment;' in that state of the case it is penitentiary for life."

The presiding justice in the case of United States v. Bram, tried in U. S. court at Boston, used the following language: "Gentlemen, under the law of the United States, as it now stands, your verdict may be either guilty, not guilty, or guilty, without capital punishment."

17 6. In view of the foregoing it would appear that if there existed any reason to attempt to construe a law so plain in its letter as the act of Jan. 15, 1897 (which we deny), that the trial justice in his construction misconceived the spirit of that act. It plainly was not the intention of Congress to divide the crime of murder into two degrees. Therefore, to limit the application of this act to "cases that have palliating circumstances" was beyond the power of the trial judge and was manifest error.

18 The presiding justice also charged the jury in this case (Record, p. 8, line 11): "There is no evidence that has been adduced which tends to show any palliating or mitigating circumstances." This, we submit, is plain error. Indeed, to justify the judge's charge that a qualified verdict can not be given, unless there are mitigating circumstances, we must assume the theory that the statute created degrees or classes of murder; that it divided the offence into cases without mitigating circumstances, and fixed the death penalty as punishment, and into cases with mitigating circumstances with life imprisonment as punishment. If this theory be correct, then the judge's charge that there were no mitigating circumstances in this case eliminated from the consideration of the

jury that degree of murder the punishment for which is life imprisoment, and made it obligatory upon them to impose the death penalty.

Similar to this is the case of Hoyt v. Utah, 110 U. S., 574, 582, where under a statute it is for the jury to say whether the facts make a case of murder in the first or second degree, the court told the jury: "That an atrocious and dastardly murder has been committed by some person is apparent." This court said that the instruction was naturally regarded by them as an instruction that the offence, by whomsoever committed, was murder in the first degree.

19 7. The jury in this case were plainly told that they should only qualify their verdict under "palliating circumstances which would seem to justify and require it," and they had been told with equal directness that "no evidence has been adduced which tends to show any palliating or mitigating circumstances."

This, it is submitted, is a virtual, and indeed emphatic, direction to the jury not to add the qualifying words to their verdict in this case.

It is a virtual denial of this statute to this accused, and leaves him in no better plight than a refusal to acquaint the jury with the provisions of the statute of January 15, 1897, would have done, which would have been palpable error. (See Colton v. Utah, 130 U. S., 83.)

The syllabus of which case is as follows:

"In a conviction for murder in the first degree in Utah: Held, that the court erred in not directing the attention of the jury to the provision of the penal code as to their right to recommend imprisonment for life, at hard labor, in the penitentiary in place of the punishment by death.

"By such action the court deprived the prisoner of a substantial right."

20 And, finally, it is respectfully submitted that the charge of the trial judge, taken in its entirety, was a direction to the jury not to add the qualifying words to their verdict in this case. It is nowhere denied that, in any view of the law, to the jury must be left at last the right to make up their verdict on this, as well as every other part of the case; and this, we apprehend, is equally true, even if it be considered proper for the trial justice to advise and instruct them upon this point. The jury must finally be left untrammeled to add or withhold the qualifying words as they see fit. Such necessary freedom of action, we contend, was denied the jury in this case. We quote from the dissenting opinion of Mr. Justice Shepard in this case: "With such instructions as were given in this case, no jury composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants. * * * It did not give the accused the benefit of the statute."

21 8. Wherefore your petitioner, being advised by his counsel that the said charge of the trial justice above cited was a misconstruction of the act of Jan. 15, 1897, and that by reason of said construction he was deprived of a substantial right, prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the court of appeals of the District of Columbia, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said court

of appeals of the District of Columbia in the said case therein, entitled Charles Winston, appellant, versus The United States, appellee, No. 804,
to the end that the said case may be reviewed and determined
22 by this court, as provided by the act of Congress of March 3d, 1897, entitled an act to authorize the Supreme Court of the United States to issue writs of certiorari to the court of appeals of the District of Columbia in the same cases and manner that it may do in respect of the circuit court of appeals, and that your petitioner may have such other and further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the court of appeals of the District of Columbia, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray.

GEO. KEARNEY,
Attorney for Petitioner.
CHAS. H. TURNER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 432.

WILLIAM M. STRATHER, PETITIONER,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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a Transcript of record. Court of appeals, District of Columbia, April term, 1898. No. 795. No. 8, special calender. William M. Strather, appellant, vs. The United States. Appeal from the supreme court of the District of Columbia. Filed April 25, 1898.

1 In the court of appeals of the District of Columbia.

WILLIAM M. STRATHER, APPELLANT, vs. THE UNITED STATES. } No. 795.

Supreme court of the District of Columbia.

THE UNITED STATES vs. WILLIAM M. STRATHER. } No. 21474. Criminal.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Filed in open court December 31, 1897.

In the supreme court of the District Columbia, holding a criminal term, October term, A. D. 1897.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America in and for the District of Columbia aforesaid upon their oath do present:

That one William M. Strather, late of the District aforesaid, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at and in the District aforesaid, in and upon the body of one Rosa Talbert, she, the said Rosa Talbert, in the peace of God and of the said United States then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said William M. Strather, with a certain hatchet of the value of one dollar, which said hatchet he, the said William M. Strather, in his right hand then and there had and held, the said Rosa Talbert, in and upon the head of her, the said Rosa Talbert, then and there feloniously, wilfully, and of his malice aforethought did strike, thrust, and penetrate, giving to her, the said Rosa Talbert, then and there, by such striking, thrusting, and penetrating aforesaid, with the hatchet aforesaid, in and upon the head of her, the said Rosa Talbert, one mortal wound of the length of five inches and of the depth of three inches, of which said mortal wound she, the said Rosa Talbert, then and there instantly died.

2 And so the grand jurors aforesaid upon their oath aforesaid do say that the said William M. Strather her, the said Rosa Talbert,

in the manner and by the means aforesaid, feloniously, wilfully, and of malice aforethought did kill and murder, against the form of the statute in such case made and provided and against the peace and Government of the United States.

SECOND COUNT.

And the grand jurors aforesaid upon their oath aforesaid do further present:

That the said William M. Strather, late of the District aforesaid, on the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, at and in the District aforesaid, in and upon the body of one Rosa Talbert, she, the said Rosa Talbert, in the peace of God and of the said United States then and there being, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said William M. Strather, with a certain hatchet of the value of one dollar, which said hatchet he, the said William M. Strather, in his right hand then and there had and held, the said Rosa Talbert, in and upon the head of her, the said Rosa Talbert, then and there feloniously, wilfully, and of his malice aforethought did strike and beat, giving to her, the said Rosa Talbert, then and there, by such striking and beating aforesaid, with the hatchet aforesaid, in and upon the head of her, the said Rosa Talbert, divers mortal fractures, bruises, and contusions, of which said divers mortal fractures, bruises, and contusions she, the said Rosa Talbert, then and there instantly died.

And so the grand jurors aforesaid upon their oath aforesaid do say that the said William M. Strather her, the said Rosa Talbert, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder, against the form of the statute in such case made and provided and against the peace and Government of the said United States.

HENRY E. DAVIS,
Attorney of the United States in and for the said District of Columbia.

(Endorsed:) No. 21474. United States vs. William M. Strather. Murder. Witnesses: S. L. Cooper, M. P.; James H. Lutton, M. P.; Joseph C. Baylor. A true bill. Richard T. Fussell, foreman.

Supreme court of the District of Columbia.

TUESDAY, *Jan'y 11, 1898.*

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

3 UNITED STATES *vs.* WILLIAM M. STRATHER. } No. 21474. Indicted for murder of Rosa Talbert.

Come as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of Columbia; and thereupon the defendant being arraigned upon the indictment, he pleads thereto not guilty and for trial puts himself upon the country, and the attorney of the United States doth the like.

Memorandum.

February 7, 1898.—Jury sworn and respited from day to day until—
February 10, 1898.—Verdict, guilty as indicted.

Supreme court of the District of Columbia.

FRIDAY, *March 4, 1898.*

The court resumes its session pursuant to adjournment, Mr. Justice Bradley presiding.

UNITED STATES *vs.* WILLIAM M. STRATHER. } No. 21474. Convicted of murder of Rosa Talbert.

Come as well the attorney of the United States as the defendant in proper person, in custody of the warden of the jail of the District of Columbia, and by his attorneys, Messrs. S. D. Truitt and Benjamin T. Roodhouse; whereupon, the defendant's motion for a new trial coming on to be heard, after argument, it is considered by the court that said motion be, and it is hereby, overruled; whereupon the attorney of the United States moves the court to pronounce the sentence of the law in this case, and it is immediately demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon it is considered by the court that for his said offense the said defendant be taken by the warden aforesaid to the common jail, from whence he came, and there to be kept in close confinement, and that on Thursday, the fifth day of May, A. D. 1898, he be taken to the place prepared for his execution within the walls of the said jail, and then and there, between the hours of ten (10) o'clock antemeridian and one (1) o'clock postmeridian of the same day, he, the said defendant, be hanged by the neck until he be dead, and may God have mercy on his soul; and thereupon the defendant, by his attorneys, pray an appeal to the court of appeals of the District of Columbia, which is allowed by the court.

4 Filed Mar. 5, 1898. J. R. Young, clerk.

In the supreme court of the District of Columbia.

THE UNITED STATES *vs.* WILLIAM M. STRATHER. } No. 21474. Criminal.

The President of the United States to Henry E. Davis, Attorney of the United States in and for the District of Columbia, greeting:

You are hereby cited and admonished to be and appear at a court of appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal noted in the supreme court of the District of Columbia on the 4th day of March, 1898, wherein William M. Strather is appellant and the U. S. is appellee, to show cause, if any there be, why the judgment

rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 5th day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

JOHN R. YOUNG, *Clerk.*

[Seal supreme court of the District of Columbia.]

Service of the above citation accepted this 5th day of March, 1898.

HENRY E. DAVIS,
Attorney for Appellee.

Memorandum.

March 24, 1898.—Leave to defendant to prosecute appeal without bond.

Filed April 20, 1898.

In the supreme court of the District of Columbia.

THE UNITED STATES OF AMERICA }
vs. } Criminal. No. 21474.
WILLIAM H. STRATHER. }

Defendant's bill of exceptions.

At the trial of this cause, before the Honorable Andrew C. Bradley and a jury, the prosecution offered and gave evidence tending to show that the defendant and Rosa Talbert had been and at the time of the homicide were living together as man and wife; that the woman was the wife of another man; that she was employed as a domestic in a house of ill-fame and the defendant was a vender of newspapers; that they usually spent their nights together at a room rented by the defendant; that for several nights prior to the homicide the woman failed to join him; that he threatened to kill her; that the night of the homicide they occupied the same room, and the next morning very early the occupants of the lower rooms, hearing an unusual noise in defendant's room, and having knocked at his door and failed to get an explanation, summoned the police; that upon entering defendant's room the police officer asked him what was the matter, and he replied that he reckoned it was murder; that the woman was found lying crosswise the bed, dead; that the floor was tracked with blood by the feet of the defendant, whose stockings were saturated with blood, and a large pool of blood was on the floor near the bed; that there were six wounds on the head of the dead woman, four of which went into the brain substance and were absolutely fatal; that they were probably made by a hatchet, such as the one produced, which, blood-stained, was found in the room; that two of these wounds were on the left side of the face, a half inch apart, the upper one an inch deep and one and one-half inches long, cutting the temporal artery and into the bones of the joint; the lower one was one inch long and one inch deep, fracturing the superior maxilla; that another wound was

in the forehead, across over the eyebrows, four and one-half inches long and two and one-half inches deep—a compound, comminuted depressed fracture of the skull; another wound was on the right side of the head, just above the ear, three inches long and one and a half inches deep, fracturing the temporal bone; another wound extended across the middle of the right ear, cutting it in two; it was a wide, gaping wound, three inches long, two and one-half inches deep, mashing in that side of the face and skull, and another wound was in the cheek, one and a half inches long and one inch deep; and there the prosecution rested.

The defendant thereupon, to maintain and prove the issue upon his part joined, introduced several witnesses and took the stand in his own behalf. The evidence given by the several witnesses, as aforesaid, and by himself, as aforesaid, tended to prove the defendant's previous reputation as a peaceful and law-abiding citizen, the deceased's previous reputation as a quarrelsome and violent woman; that the deceased had on previous occasions assaulted the defendant, on one occasion throwing at the defendant a beer mug, and on another occasion cutting the defendant with a penknife; that the deceased had previously threatened the life of the defendant, and that the defendant knew of said threat; that on the morning of the homicide, and immediaiely before the sounds accompanying the said homicide, there had been a quarrel between the deceased and the defendant; that upon the arrest of the defendant, immediately after the homicide, there was a bleeding wound upon the face of the defendant. The defendant went on the stand in his own behalf, testified that the wounds in the head of Rosa Talbert which caused her death were inflicted by him upon the said Rosa Talbert with a hatchet The defendant denied that he had ever threatened the life of the said Rosa Talbert, and affirmed that he had committed the acts alleged in the indictment while under fear of his life and during the heat and
6 excitement of the quarrel and while suffering pain from a blow of the deceased on his left jaw, where there was an ulcerated sore at the time he received the blow; and thereupon the defendant rested.

And thereupon, the evidence being closed on both sides, the defendant, by his counsel, requested the court to grant the following instructions to the jury:

1. The jury are instructed that if they believe from the evidence that the accused acted under a sincere apprehension of an immediate and actual danger to his life or body, although his life was not in danger, they should acquit.

2. If the jury believe from the evidence that the accused received a blow and immediately revenged it with any instrument he happened to have in his hand, and death ensued, this will be only manslaughter, provided the fatal blow is to be attributed to the passion of anger arising from the previous provocation, and the jury should so find.

3. If the jury believe from the evidence that death ensued in the heat of blood or immediate provocation, there having been no previous malice, the offence is manslaughter, and the jury should so find.

4. If the jury are of the opinion that the wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might be considered as not being at the moment the master of his own understanding, the offence will be manslaughter and the jury should so find.

5. In case the jury find the prisoner guilty of murder, they are instructed that they may qualify their verdict by the words "without capital punishment," no matter what the evidence may be.

6. If the jury, after considering the evidence, have a reasonable doubt that the accused struck the blow in cold blood and with malice aforethought, they should not convict of murder.

The justice presiding refused to grant, as asked and without modification, the first, second, third, fourth, fifth, and sixth of said requests of the defendant, and to which ruling and refusal to grant said first, second, third, fourth, fifth, and sixth requests for instructions the defendant, by his counsel, then and there excepted separately as to each ruling and prayed the presiding justice to note their said several exceptions upon his minutes, which was done.

And after the noting of said exceptions and making the same a part of the record, which is also made a part hereof, the court of its own motion instructed the jury as follows:

Gentlemen of the jury: It has now become my duty to submit to you some instructions upon the law that shall govern you in your deliberations upon the evidence that has been adduced in your hearing, and when I have so done my duty shall have been performed and the whole responsibility in this case and its outcome will rest upon you.

The indictment charges the defendant with the murder of Rosa Talbot. The testimony has established conclusively, without the admission of the defendant upon the stand when he testified
7 as a witness, that the death of Rosa Talbot was accomplished by the defendant by the use of a hatchet, by means of which the defendant made several mortal wounds upon the head of the deceased woman. The defendant took the stand as a witness in his own behalf, and he has admitted that he made the wounds that caused the death of this woman.

He has admitted that the woman was not his wife, although they were living together as man and wife. The testimony of one witness who was produced for the purpose of adding something to your information in this case, that the court was obliged under the rules of evidence to exclude, showed that the deceased woman was the wife of that witness. This adulterous intercourse between this defendant and the woman that he killed resulted, perhaps not unnaturally, in a homicide, and you are to determine upon the evidence whether a crime was committed in the perpetration of that homicide, and, if so, what was the nature of that crime.

While admitting that he inflicted the blows upon the head of the deceased woman that caused her death, the defendant defends as against the ordinary consequences of such an act by the claim—and his testimony in support of the claim—that this act of his that accomplished the death of his victim was a necessary act for his own protection; that he killed her in self-defense. If that is not so, he says, if he were not justified in defending himself against an assault made by her upon him, which was of such aggravated nature as compelled him to act as he did, yet the nature of that assault was such that he was rendered furiously angry; that his reason was dethroned for the time being, and that he struck these fatal blows under the impulse of passion recently and reasonably excited, and if he is not guiltless under the law, in your judgment, then he is guilty only of manslaughter.

The indictment charges that the defendant is guilty of murder. The indictment, however, is but a charge. It is the assertion of the fact. Under such an indictment the jury may find any one of several verdicts, as the evidence may satisfy them under their oaths that such verdict is the proper and just one under all the circumstances in the case. The jury may render a verdict of not guilty, if they are satisfied from the evidence that the defendant in killing this woman was justified by the law of self-defense. The jury may return a verdict of guilty of manslaughter under such an indictment as this, if not satisfied that the defendant perpetrated the act under the necessity of the law of self-defense, but did it in the heat of passion, excited upon and by a reasonable provocation, or the jury may return a verdict of guilty as indicted, if they are satisfied by the evidence that such verdict should be returned.

It becomes necessary, therefore, for the court to give you some suggestions as to what constitutes murder and what constitutes manslaughter and what constitutes the law of self-defense. In so doing, for the purpose of convenience and as the instruction has received the approval of a higher court, I will read the instructions that were given by me in another case:

8 "Murder is the unlawful killing of a human being by a person of sound memory and discretion, with malice aforethought. Manslaughter is the unlawful killing of a human being by a person of sound memory and discretion, without malice. The essential difference between the two crimes is this: that in murder, malice must be established by the evidence, for that is the essence of the crime; but in manslaughter that element is presumed to be wanting. Malice may be expressly indicated by evidence of declarations which evince a malignant disposition and purpose, such as threats to kill. Malice may be implied from circumstances, and they may be as forceful and indicative of its existence as the most direct expressions by word of mouth, as, for instance, the character of the assault and the means used to accomplish the homicide.

"Malice need not be solely directed to the deceased. It does not mean only an expression of hatred or ill will to an individual, but it means any wicked or mischievous intention of the mind prompting to an act. It is not necessary, to make out the crime of murder, to show that the witness had any enmity to the deceased.

"Evidence of the absence of ill will can not furnish an accused person with any defense when it is proved that the act of killing was intentional and done without any justifiable cause.

"Malice is presumed or implied when a man commits an unlawful act unaccompanied by circumstances justifying its commission. It is then presumed that he has acted advisedly and with an intent to produce the natural consequences of such an act."

Inasmuch as a wound from a hatchet, used as the testimony in this case indicates that implement was used in accomplishing the death of the deceased, is likely to produce death, the court instructs you that such an instrument is a deadly weapon, and when a wound is made by a deadly weapon which may and actually does cause death, if made without such provocation or under such circumstances as reduce the crime to manslaughter, or under such circumstances as fail to indicate that any crime has been committed, such act is deemed malicious, and the killing is murder.

"Malice aforethought, therefore, may mean that evil impulse which prompts the execution of an unlawful act upon another that may and does result in death. It may exist as the result of deliberation and premeditation for minutes, hours, days, or any length of time before the act that is its climax and chief expression is committed, and it may exist for no appreciable time before. It may be as slow in forming as would consume weeks in deliberation and premeditation, and it may be as quick in conception and purpose as the flash of thought. Premeditation and deliberation may be elements of malice aforethought, but they are not essential to its existence, and malice aforethought, in the sence of the law, frequently does exist without either deliberation or premeditation.

"There is no particular period during which it is necessary that malice should have existed or the prisoner should have contemplated the homicide. If, for example, the intent to kill or to do other great bodily harm is executed the instant it springs into the mind, the offence is as truly murder as if had existed there for a longer period.

"An unlawful killing is a killing without justifiable or excusable cause. Such killing, if malicious, is murder, and if without malice, is manslaughter. If one kill another by an act of carelessness or negligence, or in the heat of sudden passion excited by recent, reasonable provocation, or under circumstances of an actual but not a reasonable apprehension of serious bodily harm or the loss of life at the hands of the person killed, and without malice, it is unlawful and he is guilty of manslaughter."

As to reasonable provocation, it may be well to say that words, however opprobrious or improper they may be, are never judged to be reasonable provocation for passion; neither is a slight blow from the hand of a person who is the inferior in strength—for instance, a slight blow from the hand of a child, or a slight blow from the hand of a woman.

It is impossible, however, for the court to lay down a definite, fixed rule as to what will justify and be considered reasonable provocation. It is a question that must always be left to the jury, and with the jury the question always must be whether, putting yourself in the place of the party who claims that he was reasonably provoked and his passion so excited by an act that he killed the party exciting his passion in the heat of that passion, the circumstances relied upon as provocation, as indicating reasonable provocation, is such a circumstance as a reasonable man, situated as he was, would have been excited by it to the degree of passion which would lead him to perpetrate a homicide.

"The right of self-defense is the right to immunity from the consequences of acts done under the actual or reasonably apparent necessity for the protection of life or limb. If one who is free from fault himself, who has not sought to bring about the difficulty, is assaulted by another in such a serious manner as to cause him to reasonably and honestly apprehend imminent danger to himself, either of loss of life or great bodily harm from his assailant, from which he has no way of escape, kills his assailant, he is held justified by the law of necessity, and is not guilty of either murder or manslaughter."

The first question for you to determine, taking the several questions in their inverse order, would be whether the evidence that you have

heard is of such character as to justify you in acquitting the defendant on the ground that the act that he perpetrated was perpetrated under the necessity of self-defense.

In order to justify that claim, it should appear to you by the evidence that the assault that the defendant has claimed was made upon him by the deceased woman was of such character and made under such circumstances that the defendant had reason to believe, had reason to apprehend, and honestly did apprehend from that assault either the loss of his own life or great bodily harm to himself.

Great bodily harm, you will readily see, does not mean a slight blow with the hand or a blow with anything that was of such a nature as not likely either to cause death or to occasion great bodily harm. A man is not justified in killing his assailant if he simply apprehends a slight bruise, or if he apprehends anything less than great bodily harm or loss of life. He must not only apprehend such great bodily harm or loss of life—honestly apprehend it—but the circumstances must be such that you, putting yourself in his place, as reasonable men, would say that there was reason to apprehend such great harm to himself or loss of life.

Has the defendant made out such a case as indicates a reasonable or apparent necessity to protect himself against an assault from this woman by the use of a deadly weapon upon her? In determining the proper answer to that question you should consider all the circumstances that have been detailed in evidence; consider the relations *to* the parties. They were not married. They were under no necessity of living together. They were living together in open violation of the law. Consider such testimony as you have had adduced in your hearing of former quarrels, of former assaults, and the manner in which such former quarrels or such former assaults affected the defendant, as indicating the probability or improbability of his being impressed at the time that she, as he said, made an assault upon him, with the necessity of protecting himself from an injury at her hands by the use of a deadly weapon. Consider the relative size and weight and strength of this man and the woman.

And with reference to this question, whether these blows were struck for the purpose of defending his own body from serious injury, consider the character of the blows, the weapon used, the number of blows that were inflicted, and from all these circumstances ascertain whether the claim by the defendant that he was acting in self-defense is well founded. If you believe from the evidence that this claim is well founded, in view of the statement of the law, as the court has given it to you, you should return a verdict of not guilty. If, however, you are not satisfied that that defense has been made out, you should inquire, in the next place, whether only the crime of manslaughter has been committed.

You should not convict this defendant of manslaugter unless you are satisfied of his guilt, unless the evidence is such that you are convinced of his guilt, unless you believe from the evidence, beyond a reasonable doubt, that he is guilty.

A reasonable doubt is a doubt that reasonable men would entertain of guilt after listening to the evidence and carefully scrutinizing it and weighing it. It does not mean any sort of captious doubt that the mind of man may raise, for, as I have had frequent occasion to say, some men

are so constituted that they will doubt anything—they will doubt the evidence of their own senses—but it means such a doubt as reasonable men entertain after carefully weighing and scrutinizing the evidence. The defendant is entitled to the benefit of such doubt, and he should not be convicted of either manslaughter or murder if the jury entertain such a doubt.

11 As I have already indicated to you, gentlemen, manslaughter is an unlawful killing without malice. Manslaughter may be a mere act of negligence. Manslaughter may be made out by circumstances that indicate that the party perpetrating the homicide, while not acting in self-defense, yet committed the homicide in the heat of passion that was excited upon recent reasonable provocation. Manslaughter may also be indicated by such state of facts as show that the party perpetrating the homicide, honestly believing that his life was in danger, but forming such apprehension carelessly and negligently, under circumstances that showed the jury that he ought not to have entertained any such apprehension, yet kills under the impulse of such fear.

It is for you to say whether the circumstances that have been detailed by the defendant are such as would bring him within the definition that the court has given you and within the limitation of the law of manslaughter as it has been asked in behalf of the defendant. It is not enough that the homicide is perpetrated in the heat of passion. If a man perpetrates a homicide in the heat of passion that is not reasonably excited, passion that ought not to have been excited by the circumstances which he claims excited him, then he has no right to claim that the homicide is manslaughter because perpetrated in the heat of passion. The heat of passion must be such passion as is excited by recent reasonable provocation.

Did the defendant have such reasonable provocation? That is the question that the court will submit absolutely to you, gentlemen. I can not throw any further light upon it than I have. The question is simply this: Whether you, as reasonable men, putting yourselves in the place of the defendant at the time he says he was attacked by the deceased, if you believe that he was attacked, should have been so angry, so excited to passion of such degree and extent as would lead you to perpetrate the act that he committed upon the head of this woman?

If you do not believe that the homicide was justified by the apparent necessity of self-defense, as the court has defined that to you, or that the mortal wounds were inflicted upon the deceased by the defendant in the heat of passion, excited by a reasonable provocation, and you do believe from the evidence, beyond a reasonable doubt, as the court has defined that expression to you, that the defendant made those wounds upon the deceased wilfully and maliciously, your verdict should be guilty as indicted.

The court has defined to you malice. Whether malice existed in this case, as the court has already intimated to you, is to be determined by the testimony, if you credit it, of previous threats, and the denial of having made such threats by the defendant, the character of the wounds that were inflicted, their number, and the situation and relation of the parties to this conflict at the time the several wounds were made, the relative size and weight of the two combatants, if you believe there was a combat, and all the other circumstances in evidence.

If you should reach the conclusion, gentlemen of the jury,
12 that your verdict should be guilty as indicted, it is your right, under a recent act of Congress, passed in January, 1897, to add to this verdict "without capital punishment."

As I had occasion to remark yesterday, the jury have this power in any given case. The court can not control your act at all. The court can only advise you as to the law. The responsibility is entirely with you, and you can render such verdict as you please. I mean that you have the power to do it. You can render a verdict of not guilty in a case where the evidence clearly shows guilt. Of course, such action on the part of the jury would be a direct violation of their oaths. If the jury believe a man was guilty, and simply out of pity or sympathy or mercy, rendered a verdict of not guilty, they would violate their oaths.

I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; it is fixed by law; the jury neither make nor unmake it. Doubtless the intention *the* the legislature was this: that in a case in which the jury reach the conclusion that the party on trial is guilty of murder circumstances are shown by the evidence that are of a palliating nature, they may give the defendant the benefit of those palliating circumstances and say in their verdict, "without capital punishment." If, however, the jury believe that there are no palliating circumstances, it is their duty not to add anything, but to leave the penalty as it stands. It may be that a provision of this kind in the law was intended to apply to a case somewhat like that suggested by the District attorney. Suppose a man knowing that his wife had been in improper relations with another man and roused to anger by such knowledge, but postponing from time to time, while he meets this man, the execution of his vengeance upon him, he finally concludes to and does kill him, that would be murder—a clear case of murder under the law; but those circumstances might be such as would convince the jury that the extreme penalty of the law ought not to be inflicted. There may be other cases. I simply give that as an illustration. But the object of this penalty, gentlemen of the jury, is to protect society; and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy them that this provision should be added to the verdict.

I should say right here, gentlemen, that if you reach the conclusion of guilt—"Guilty as indicted"—it is your duty to return that verdict; and unless you unanimously agree that the verdict should be qualified as the statute provides you may qualify it, there can be no qualification. It must be the unanimous conclusion of the jury. The question for you to ask yourselves is this: Are the circumstances in this case such (if you reach the conclusion that the defendant is guilty as indicted) as to require you, upon your oaths, to interfere with the penalty fixed by law? The defendant and the woman he slew were living together in adultery. It
may be that neither of them was a good and useful citizen in this
13 community; but he is entitled to the protection of the law. He should not be convicted unless the evidence justifies a verdict of guilty, as the court has explained to you. She was also entitled to the protection of the law, and the mere fact that she was a woman of loose morals, living in open adultery with this man, should make no difference whatever with you in your judgment upon the evidence.

The responsibility of the outcome of this case is with you entirely. The court can not help you any further. You are not responsible for the law. The law has been made by the Congress of the United States and has received the approval of the Chief Executive. It was made for your protection and for mine. The law should be vindicated in any case and every case where the evidence shows that it has been violated. Neither are you responsible for the situation or state of affairs that has been shown by this prosecution and the evidence in support of it. If this man killed this woman, he created the situation. You are not responsible for it. You are simply to determine, upon your oaths, whether the circumstances are such as to require you to return a verdict of guilty as indicted; or, if not guilty as indicted, whether it justifies you, requires you, to return a verdict of guilty of manslaughter; or, if not guilty of either murder or manslaughter, a verdict of not guilty.

Now, gentlemen, take this case and dispose of it, considering simply the law and the evidence you have heard, being actuated by no motives whatever, either of revenge or sympathy. Do justice between this man and the United States.

The defendant thereupon, by his counsel, and before the jury retired to consider of its verdict, specifically excepted to that portion of the said instruction of the court to the jury relating to the act of January 15, 1897. After the noting of said exception to said instruction of the presiding justice to the jury and making the same a part of the record, and which is also made a part hereof, the jury retired to deliberate upon its verdict.

And because the aforesaid action of the court in refusing the requests of the defendant, as aforesaid, does not appear of record, the defendant, by his counsel, prays the justice presiding to sign and seal this his bill of exceptions, which is accordingly done, now for then, this 20th day of April, A. D. 1898.

A. C. BRADLEY, *Justice.* [SEAL.]

Supreme court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 23, inclusive, are true copies of the originals in case No. 21474, criminal, United States vs. William M. Strather, as the same remains upon the files and records of said court.

14 In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25th day of April, A. D. 1898.

JOHN R. YOUNG, *Clerk.*

[Seal supreme court of the District of Columbia.]

(Endorsed on cover:) District of Columbia supreme court. No. 795. William M. Strather, appellant, vs. The United States. Court of appeals, District of Columbia. Filed Apr. 25, 1898. Robert Willett, clerk.

15 TUESDAY, *May 17th, A. D. 1898.*

WILLIAM M. STRATHER, APPELLANT,
vs.
THE UNITED STATES; } No. 795.

and

EDWARD SMITH, APPELLANT,
vs.
THE UNITED STATES; } No. 797.

and

CHARLES WINSTON, APPELLANT,
vs.
THE UNITED STATES. } No. 804.

The argument in the above-entitled causes was commenced by Mr. B. T. Roodhouse, attorney for the appellant in No. 795, and was continued by Mr. George Kearney, attorney for the appellant in No. 804, and by Mr. Warder Voorhees, attorney for the appellant in No. 797, and by Messrs. John E. Laskey and D. W. Baker, attorneys for the appellee, and by Mr. Charles H. Turner, attorney for the appellant in No. 804, and was concluded by Mr. Samuel D. Truitt, attorney for the appellant in No. 795.

16 WILLIAM M. STRATHER, APPELLANT,
vs.
THE UNITED STATES. } No. 795.

Mr. Chief Justice Alvey delivered the opinion of the court:

The indictment in this case is for murder, found under section 5339, Revised Statutes of the United States, which provides that "every person who commits murder within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, * * * shall suffer death." This provision, though found in the general revision of the statutes of the United States, and not in the revision of the statutes relating to the District of Columbia alone, is nevertheless in full force in this District. That has been decided in several cases and is no longer an open question. United States vs. Norris, 1 Cr. C. C., 412; United States vs. Guiteau, 1 Mackey, 498; United States vs. Barber, 20 D. C. Rep., 79; United States vs. Cross, 20 D. C. Rep., 365.

The appellant, William M. Strather, was indicted on the 31st day of December, 1897, for the crime of wilful murder, charged to have been committed in killing one Rosa Talbert, on the 15th day of October, 1897. To the indictment the accused pleaded not guilty, and he was duly tried by a jury, who rendered a verdict of guilty as indicted without more; whereupon he was sentenced by the court to be hung. He has appealed.

To the decision of the questions presented on this appeal it is not necessary or material to recite the facts of the case as set out in the bill of exceptions. The prisoner on the trial offered six prayers for specific instructions to the jury, which were refused by the court. The first four

of these prayers related to questions of justification and to provocation that would reduce the homicide to manslaughter; and the fifth prayer asked that the jury be instructed that they might qualify their verdict, under the statute, with the words "without capital punishment," "no matter what they might find the evidence to be;" and the sixth prayer asked that the jury be instructed that if they should have a reason-
17 able doubt whether the accused struck the fatal blow in cold blood and with malice aforethought, they should not convict of murder. The court was clearly right in rejecting all of these prayers, as they were greatly calculated to mislead the jury if they had been granted.

The subjects of all these several prayers, however, were fully covered, and clearly explained, by the judge in his very carefully prepared charge to the jury. He stated fully what would constitute murder and what manslaughter, and what would be excusable or justifiable homicide, committed in self-defence, as defined by the authorities. Indeed, all the questions raised in the defence of the accused were fully and clearly defined, and fairly submitted to the jury. And that the full scope and textual reading of the charge may appear, we direct that the charge in extenso be inserted by the reporter in the statement of the case.

There are two principal questions presented by this appeal on the charge of the judge to the jury: First, whether the act of Congress of the 15th of January, 1897, referred to in the charge of the judge, applies to this District; and, if applicable, second, whether the construction and the terms of the charge as to the manner and circumstances of applying the statute, as given by the judge, were correct? If, however, the statute is not applicable to this District, it is quite clear the appellant was not prejudiced, nor in any manner affected, by either the charge of the judge as to the construction of the statute *nor* by the finding of the jury under the charge, as the statute simply relates to a qualification of the verdict as to the punishment after finding the party guilty of murder.

1. In the case of Fearson vs. United States, 10 App. D. C., 506, the question whether the act of Congress of Jan. 15, 1897, applied to this District was raised in argument, but it was not deemed necessary to decide it. It is therefore an open question whether or not the act applies to this District.

18 The act of January 15, 1897, provides, "That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life."

This act is amendatory of sections of the Revised Statutes therein referred to, and it manifestly was intended to have a general application and to extend to all places and districts over which Congress has general and exclusive legislative power, and certainly to all places and districts to which section 5339 of the Revised Statutes has application. It was not intended to have a less general application than the section to which it is an amendment. And, therefore, as section 5339 of the Revised Statutes, if not by its own express terms made applicable to this District, is made applicable by a different Congressional provision, and by judicial

construction; and there can be no reason why the amendatory act of January 15, 1897, is not equally and alike applicable to this District, so far as the crime of murder is concerned. In the act of Congress of the 21st of February, 1871 (16 Stats., 419), to provide a local government for this District, by its 34th section, it was expressly declared that "the Constitution, and all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States." Rev. Sts. D. C., sec. 93. And this provision has not been repealed by the subsequent acts of Congress substituting a different form of government for the District. Page vs. Burnstine, 102 U. S., 664, 667. It is not pretended, nor is there any ground for the least pretence, that there is anything in the existing laws applicable to this District that would be in conflict with the provision of the amendatory act of January 15, 1897, as to the crime of murder, or that would in any manner render the latter act locally applicable as to that crime.

19 We conclude, therefore, that the amendatory act of Jan. 15, 1897, is equally applicable to this District as and with section 5339 of the Revised Statutes so far as the same relates to the crime of murder.

2. Then, the next question is, whether there was error in the charge given by the court below as to the construction and the circumstances of the application of the amendatory act of Jan. 15, 1897, where the party accused has been found guilty of the crime of murder. It is contended on the part of the appellant that, by reasonable construction, the jury should be left free to declare in their verdict "without capital punishment," no matter what the evidence might be, though it be of the most atrocious and unmitigated character; and that the court has no right to instruct the jury under what circumstances the qualified or mitigated punishment should or should not be inflicted upon the party convicted; that the matter is entirely within the discretion of the jury, without any reference whatever to the circumstances of aggravation or mitigation, as shown in the proof, whether the party found guilty of murder should suffer the penalty of death or an imprisonment for life; and that the court has no right to enlighten the jury by instruction as to the proper manner of exercising their discretion with respect to the facts of the case. The court may inform the jury what constitutes murder, and analyse the crime, and descant upon the evidence, and call the attention of the jury to all the most atrocious and malicious features of the case, but, according to the present contention, it is not allowable to the court, by way of aiding the jury in arriving at a fair and just conclusion, to suggest what punishment would be proper under all the circumstances of the case. To such a contention we can not accede.

If Congress had intended to abolish capital punishment for murder, without regard to the facts of the case, however atrocious in their

20 nature, it would have done so without qualification. But Congress has not abolished capital punishment for murder, but has made the degree of punishment to depend upon the special circumstances of each case as they may be found by the jury. In many of the States, as we know, if not in a majority of them, it has long since been deemed proper and just to divide the common law crime of murder into first

and second degrees, and to prescribe the punishment accordingly. This is done because it is common experience that the general common law crime of murder often includes different degrees of atrociousness, such as to make it just to discriminate as to the degrees of punishment to be inflicted upon conviction, though the crime may be embraced under the general denomination of murder. In such cases, the trial juries are required to find in their verdict the degree of murder of which the party is guilty, and the court imposes the punishment prescribed by law. The legislation of many of the States upon this subject is referred to in the opinion of the Supreme Court of the United States, in the case of Davis vs. Utah Territory, 151 U. S., 262, 267, 268–9. But Congress, instead of dividing the crime of murder into two degrees and designating what should constitute murder in the first degree and what murder in the second degree, have done substantially something of the same nature in a different way. Under the general charge of murder, the jury are allowed to find their verdict with reference to the facts of the case, and to either find the party guilty as charged simply, which requires punishment by death, or to find him guilty "without capital punishment," which requires imprisonment for life. This finding, however, should be made with reference to the facts of the case, as it is manifest that it was never intended that a party shown to have committed the crime under the most revolting and atrocious circumstances should receive the qualified or mitigated punishment, and a party under much less revolting and atrocious circumstances should or might receive punishment by death, according to the temper and notions of different juries trying the parties. Such a principle applied in the
21 administration of justice would at once destroy that which is the most essential element of all law, and that is its certainty as applied to all parties alike, and not allowed in its application to be dependent upon the mere arbitrary whims or discretion of juries, without reference to the facts attending the commission of the crime. It is a settled principle in the administration of the criminal law in the courts of the United States that the judge charges the jury upon the whole case, both as to the law and the facts, but leaving the jury entirely free to find the facts according to the exercise of their own untrammelled judgment. The judge may arrange and comment upon the evidence of the case as a means of aiding a jury in reaching a just conclusion, but the jury must be made to understand that it is their exclusive province to determine what facts are established by the proof. But in regard to the law in criminal cases, it is the duty of the jury to receive it from the court, and to apply it as given by the court, subject, however, to the condition that by a general verdict a jury of necessity determines both law and fact as compounded in the issue submitted to them in the particular case. (Sparf and Hansen vs. United States, 156 U. S., 51.) And where a statute is involved and its construction becomes necessary for the guidance of the jury, that is matter of law, and, of course, is for the court. In construing a statute it is not only the letter, but the spirit, the reason, and legislative intent that must be regarded, and that, in all cases, presents a question for the court. And in the statute under consideration there is nothing to indicate an intention on the part of Congress to divert the court of its legitimate function, in cases where the provision of the statute is applicable.

In no case has the question of the right of the court to instruct the jury upon the entire law of the case been more firmly met, and the principle more clearly and concisely stated than by Mr. Justice Story in the case of United States vs. Battiste, 2 Sum., 240, 243–4.

22 That was a trial for a capital crime under the act of Congress of May 15, 1820, Ch. 113, to suppress the slave trade; and it appears that counsel had insisted that the jury were the judges of the law, as well as of the facts. But the learned justice, in his charge to the jury, said: "But I deny that, in any case, civil or criminal, they (the jury) have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime that the jury should respond as to the facts and the court as to the law. It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as it is laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves the effect would be not only that the law itself would be most uncertain from the different views which different juries might take of it, but in case of error there would be no remedy or redress by the injured party, for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is an adequate remedy for the injured party by a motion for a new trial or a writ of error, as the nature of the jurisdiction of the particular court may require. Every person accused as a criminal has a right to be tried according to the law of the land—the fixed law of the land—and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it."

The same question was most exhaustively considered by the late Mr. Justice Curtis in the case of the United States vs. Morris (1 Curtis, 23, 52–58). In that case it was contended that the jury in all criminal cases in the courts of the United States were the rightful judges of the existence, construction, and effect of every law that was material in a

23 criminal case. But, in response to that contention, Mr. Justice Curtis, among other things, said:

"It was evidently the intention of the Constitution that all persons engaged in making, expounding, and executing the laws, not only under the authority of the United States but of the several States, should be bound by oath or affirmation to support the Constitution of the United States. But no such oath or affirmation is required of jurors, to whom it is alleged the Constitution confides the power of expounding that instrument; and not only construing, but holding invalid any law which may come in question on a criminal trial." * * * "In my opinion, it is the duty of the court to decide every question of law which arises in a criminal trial if the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the

issue, and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly; that law they apply to the facts as they find them, and thus, passing both on the law and the facts, they, from both, frame their general verdict of guiity or not guilty. Such is my view of the respective duties of the different parts of this tribunal in the trial of criminal cases, and I have not found a single decision of any court in England, prior to the formation of the Constitution, which conflicts with it."

These decisons of the two distinguished jurists, who were at the time justices of the Supreme Court of the United States, but then presiding in the circuit court, have been fully approved and adopted by a majority of the Supreme Court, in Sparf and Hansen vs. United States, supra, where the whole subject has been most elaborately and ably con-
24 sidered in opinions of both the majority and minority of the learned justices sitting in that case.

In the present case the justice, at the trial below, fully charged the jury both as to the law and as to his view of the facts, but leaving the facts entirely to the jury. And with respect to the amendatory act of January 15, 1897, the judge was explicit in charging the jury that if they concluded that the accused was guilty of murder it was their right, under the act of Congress, to add to their verdict "without capital punishment." He further said: "I have no doubt that this act of Congress was intended to serve some useful purpose. The penalty for murder has not been disturbed by this act of Congress; that is fixed by law, and the jury can neither make nor unmake it. Doubtless the intention of the legislature was this: that in a case in which the jury reached the conclusion that the party on trial is guilty of murder and circumstances are shown by the evidence that are of a palliating nature they may give the accused the benefit of those palliating circumstances, and say in their verdict, "without capital punishment." If, however, the jury believe that there are no palliating circumstances it is their duty not to add anything to their verdict, but to leave the penalty as it stands." And the judge further added: "But the object of this penalty is to protect society; and the jury should not interfere with it under any circumstances, unless the circumstances are such as to satisfy the jury that this qualification provided by the statute should be added to their verdict."

This, we think, was clearly right. If it was not the intention of Congress to abolish capital punishment, but to leave the matter of degree of guilt to the finding of the jury, that must, in the nature of things, depend upon the facts of the case. We think the judge below was strictly right in the interpretation of the act of the 15th of January, 1897, and that there was no error in the terms of the charge to the jury. The jury were left entirely free, under the instruction of the court, to determine the question, whether the circumstances of the crime charged were
25 of a character to justify them in returning a verdict for the mitigated punishment, or such as was returned by them.

In several of the States of the Union statutes substantially similar to that of the act of Congress of January 15, 1897, exist, and in many of such States those statutes have been construed by the courts and given practical application; and, with but one or two exceptions, brought to our attention, those statutes have been construed and applied, under the

direction of the courts, in the same manner that the act here in question has been construed and applied by the court below, in the charge given the jury. The People vs. Welch, 49 Cal., 179; People vs. Brick, 68 Cal., 190; People vs. Bawden, 90 Cal., 195; Brown vs. State, 109 Ala., 70; Inman vs. The State, 72 Ga., 269; Valentine vs. The State, 77 Ga., 483; Nowacryk vs. State, 139 Ill., 336. In all these cases, upon statutes substantially similar to the act of Congress here involved, the courts have held that the degree of punishment should be determined with reference to the special facts and circumstances of the case.

Finding no error, the judgment appealed from must be affirmed; and it is so ordered.

Judgt. affirmed.

26 WILLIAM M. STRATHER, APPELLANT, *vs.* THE UNITED STATES; No. 795.

and

EDWARD SMITH, APPELLANT, *vs.* THE UNITED STATES; No. 797.

and

CHARLES WINSTON, APPELLANT, *vs.* THE UNITED STATES. No. 804.

Dissenting opinion of Mr. Justice Shepard.

I am unable to concur with my brothers in their construction of the act of Congress which provides that when an accused person shall be found guilty of murder, "the jury may qualify their verdict by adding, 'without capital punishment.'"

In my opinion, the language of the act is plain and affords no room for construction—for appeal from its letter to its spirit.

Public policy in respect of the punishment of offenses is a matter within the exclusive control of Congress, and departures therein, whether to be regarded as wise or unwise, must be given effect to as declared.

To my mind, it appears plain, that whilst Congress did not abolish capital punishment for the crime of murder, it nevertheless committed the matter of its infliction to the uncontrolled discretion of the jury in each case.

If it had been intended that the exercise of this power of commutation of the death penalty should depend upon the court, or upon the jury, subject to the advice and admonition of the court, I think it would have been expressly so declared.

Whether, in the exercise of an unlimited discretion, juries may or may not make distinctions between criminals, not justified by the conditions of their respective cases, or, in practice, virtually abolish the death penalty, is wholly beside the question. In the exercise of its own undoubted discretion in the premises, Congress has seen proper to commit the power to the jury, and to the jury alone.

27 In construing the statute to mean that the court may, without error, admonish the jury in respect of the grounds upon which they may commute the death penalty by the addition to their verdict, it is not denied that he is compelled also to instruct them that it is their privilege to exercise the power notwithstanding.

With such instructions as were given in this case, no jury, composed of good citizens, accustomed, as it is their duty, to accept and apply the law as given them in charge by the court, could have extended clemency to any one of these appellants.

After such an admonition, to such a jury, the further information that they might, nevertheless, commute the punishment was but a meaningless formality. It did not give the accused the benefit of the statute.

I cannot accept as sound the argument that the purpose of Congress in this enactment was substantially the same as shown in the legislation of the States, whereby the offense of murder has been divided into two degrees—murder of the first and murder of the second degree.

On the contrary, it seems to me that there is a substantial difference of purpose. Under the State statutes referred to, murder of the first degree consists of homicide committed in the perpetration of offenses like rape, robbery, arson, and burglary, or by poison, starvation, torture, and so forth, showing express malice. All murder not included in the definition of the first is murder of the second degree.

In the enforcement of those statutes the courts are required to declare the law to the jury in application to the facts. Where the evidence shows plainly that the accused, if guilty at all, is guilty of murder of the first degree and nothing less, it is the duty of the court to withhold from the jury the privilege of returning a verdict of guilty of murder of the second degree. The court is not required to submit the question of the degree of guilt to the jury, regardless of the evidence, as under the act of Congress it is compelled to extend to them the privilege of commuting the death penalty.

If the purposes of the two sets of statutes are the same, it would be more reasonable to hold that, under the act of Congress, the right to commute the death penalty should not be accorded to the jury at all, unless the evidence should discover something tending to warrant the exercise of clemency.

For the reasons given, I am of the opinion that the judgment in each case should be reversed.

28 Court of appeals of the District of Columbia. April term, 1898.

WILLIAM M. STRATHER, APPELLANT, }
vs. } No. 795.
THE UNITED STATES. }

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed.

Per Mr. Chief Justice Alvey, June 7, 1898.
Dissenting, Mr. Justice Shepard.

(Indorsed:) Court of appeals of the district of Columbia. April term, 1898. No. 795. Judgment. Court of appeals, District of Columbia. Filed June 7, 1898. Robert Willett, clerk.

29 Court of appeals of the District of Columbia.

I, Robert Willett, clerk of the court of appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 28, inclusive, contain a true copy of the transcript of record and proceedings of said court of appeals in the case of William M. Strather, appellant, vs. The United States, No. 795, April term, 1898, as the same remain upon the files and records of said court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals, at the city of Washington, this 8th day of October, A. D. 1898.

[SEAL.] ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsement on cover:) Case No. 17017. District of Columbia court of appeals. Term No., 432. William M. Strather, petitioner, vs. The United States. Filed October 11, 1898.